

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 28 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PALOMAR HEALTH,

Plaintiff-Appellant,

v.

AMERICAN GUARANTEE AND
LIABILITY INSURANCE COMPANY;
MORGAN JACKSON,

Defendants-Appellees.

No. 21-56073

D.C. No.
3:21-cv-00490-BEN-BGS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Submitted July 26, 2022**
San Francisco, California

Before: M. MURPHY,*** GRABER, and McKEOWN, Circuit Judges.

In this insurance coverage dispute arising under our diversity jurisdiction,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Michael R. Murphy, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

Plaintiff Palomar Health appeals the dismissal of its complaint. “We review de novo a dismissal under Rule 12(b)(6), and we can affirm on any ground supported by the record.” Thompson v. Paul, 547 F.3d 1055, 1058–59 (9th Cir. 2008).

Under California law, “interpretation of an insurance policy is a question of law.” Waller v. Truck Ins. Exch., Inc., 900 P.2d 619, 627 (Cal. 1995), as modified on denial of reh’g (Oct. 26, 1995). We affirm.¹

1. All of Plaintiff’s alleged losses fall under exclusions in the insurance policies. Plaintiff’s claims rely on losses resulting from (1) the presence of the COVID-19 virus on its property or (2) government orders.

To the extent that Plaintiff’s claims rely on the presence of “Coronavirus and COVID-19 particles” on its property, those claims are barred by the policies’ contamination exclusions. The insurance policies’ contamination exclusions apply to “any cost due to Contamination including the inability to use or occupy property” and define contamination to include “[a]ny condition of property due to the actual presence of any . . . virus” Although each policy contains an amendatory endorsement that removes the word “virus” from the exclusion, those special endorsements apply only to property in Louisiana. Because Palomar does not allege any loss or harm to property in Louisiana, the contamination exclusion applies.

¹ Appellant’s Motion for Certification, Docket No. 44, is DENIED.

To the extent that Plaintiff's claims rely on its compliance with government orders related to the COVID-19 pandemic, the claims are barred by the policies' government-order exclusions. Those exclusions apply to "[l]oss or damage arising from the enforcement of any law, ordinance, regulation or rule regulating or restricting . . . occupancy, operation, or other use"

2. Because the policies did not cover the alleged losses, Plaintiff also fails to state a claim against Defendant Morgan Jackson.² Plaintiff asserts that Defendant Jackson's representations that several of Plaintiff's losses were not covered resulted in Plaintiff's making business decisions that damaged it. But, as described above, the losses were not covered, and thus Plaintiff could not have suffered damages based on Defendant Jackson's representations.

AFFIRMED.

² Although the district court declined to rule on whether Plaintiff stated a claim against Defendant Jackson, we are not precluded from reaching this question. See Quinn v. Robinson, 783 F.2d 776, 814 (9th Cir. 1986) ("We have discretion to decide whether to address an issue that the district court did not reach if the question is a purely legal one and the record has been fully developed prior to appeal."). Because we hold that Plaintiff fails to state a claim against Defendant Jackson, we need not review the district court's conclusions concerning personal jurisdiction.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista (maria.b.evangelista@tr.com));
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to *(party name(s))*:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	REQUESTED <i>(each column must be completed)</i>			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*	<input style="width: 100%; height: 20px;" type="text"/>	<input style="width: 100%; height: 20px;" type="text"/>	\$ <input style="width: 100%; height: 20px;" type="text"/>	\$ <input style="width: 100%; height: 20px;" type="text"/>
Principal Brief(s) <i>(Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief)</i>	<input style="width: 60px; height: 20px;" type="text"/>	<input style="width: 60px; height: 20px;" type="text"/>	\$ <input style="width: 100px; height: 20px;" type="text"/>	\$ <input style="width: 60px; height: 20px;" type="text"/>
Reply Brief / Cross-Appeal Reply Brief	<input style="width: 60px; height: 20px;" type="text"/>	<input style="width: 60px; height: 20px;" type="text"/>	\$ <input style="width: 100px; height: 20px;" type="text"/>	\$ <input style="width: 60px; height: 20px;" type="text"/>
Supplemental Brief(s)	<input style="width: 60px; height: 20px;" type="text"/>	<input style="width: 60px; height: 20px;" type="text"/>	\$ <input style="width: 100px; height: 20px;" type="text"/>	\$ <input style="width: 60px; height: 20px;" type="text"/>
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee / Appeal from Bankruptcy Appellate Panel Docket Fee				\$ <input style="width: 100px; height: 20px;" type="text"/>
TOTAL:				\$ <input style="width: 100px; height: 20px;" type="text"/>

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:

No. of Copies: 4; Pages per Copy: 500; Cost per Page: \$.10 (or actual cost IF less than \$.10);

TOTAL: 4 x 500 x \$.10 = \$200.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov